No. 158 23

Brf. of Fleming, Bisbee, Fleming & Rinehart for Appellees

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Feb. 1, 1900.

HENRY L. MITCHELL, AS GOVERNOR OF THE State of Florida, *et al.*, Trustees of the Internal Improvement Fund of the State of Florida, *et al.*, Appellants,

vs.

CHALES M. FURMAN, *et al.*, Appellees.

158.

BRIEF FOR APPELLEES.

FRANCIS P. FLEMING,
HORATIO BISBEE,
FRANCIS P. FLEMING, JR.,
C. D. RINEHART,
Solicitors for Appellees.

In the Supreme Court of the United States,

OCTOBER TERM, A. D., 1899.

HENRY L. MITCHELL, as Governor of the State of Florida, et al., Trustees of the Internal Improvement Fund of the State of Florida, et al., Appellants,

vs.

CHARLES M. FURMAN, et al., Appellees.

No. 158.

BRIEF FOR APPELLEES.

Before proceeding to argument of the errors assigned by the appellants, we contend that the *fourth*, *fifth*, *sixth* and *seventh* errors assigned cannot be considered under the rule.

What is stated as the *fourth* error assigned contains eighteen specifications of error in regard to the admission and rejection of evidence. These specifications do not comply with Rule 21, requiring the full substance of the evidence admitted or rejected to be set forth, and for that reason cannot be considered, independently of the fact that the same rule is violated by including eighteen distinct specifications of error under one assignment.

Shauer vs. Alterton, 151 U. S., 607.

Packet Co. vs. Clough, 20 Wall., text 543.

Newman vs. Steel Co., 80 Fed. Rep., 228.

U. S. vs. Drainage Dist., 85 Fed. Rep., 928.

Distilling Co. vs. Rheinstrom, 86 Fed. Rep., 244.

The *fifth* and *sixth* errors assigned also fail to comply with Rule 21. The former is in the following language: "The Court erred in sustaining the findings of law and fact of the master over the exceptions thereto of the defendants Mitchell et al., the trustees, etc., numbered from one to forty-two, inclusive, and printed on pages 86 to 91 of the record." (Record, p. 105; Brief, p. 8). The latter is in sustantially the same language, except that it relates to alleged error of the Court in confirming the opinion of the master, over another series of exceptions thereto, numbered from one to sixty-five inclusive, printed on pages 91 to 97 of the record. (Record, p. 105; Brief, p. 9.) The Court is invited by the former to examine forty-two distinct exceptions, embracing six pages of the printed record, the forty-second of which contains eighteen sub-divisions, without any single exception, or the action of the Court thereon, being set forth in the assignment. By the latter the Court is invited to examine sixty-five distinct exceptions, embracing seven pages of the printed record, no one of which is set forth in the assignment of error. These assignments of error will not be considered by the Court.

U. S. vs. Drainage Dist., 85 Fed. Rep., 928.

Coal Co. vs. Loan & Trust Co., 63 Fed. Rep., 891.

The *seventh* assignment of error is a general one, that "The Court erred in making the decree dated the 6th day of April, A. D. 1898, and in decreeing the relief prayed in the bill or any relief." (Record, page 108; Brief, page 9.) Such an assignment of error would necessitate a voy-

age of discovery through a voluminous record of 382 printed pages, and fails to state, as required by Rule 21, "as particularly as may be, in what the decree is alleged to be erroneous." It presents no question for review.

Scholey vs. Rew, 23 Wall., text 345.

U. S. vs. Ferguson, 78 Fed. Rep., 103.

Doe vs. Mining Co., 70 Fed. Rep., 455.

Subject to the foregoing objections we will proceed to answer the argument of counsel for the appellants.

The reference to pages, unless otherwise stated, is the printed record. Numbers in brackets [], following U. S Supreme Court citations, refer to book and page of Lawyer's Co-operative Publishing Company Edition.

The *first* assignment of error is the refusal of the Court to dismiss the bill on motion of appellants, who were defendants in the Court below.

We are not aware of precedent or rule for the practice interjected in this case by such motion to dismiss on the grounds set forth. In a case wherein the bill should show clearly on its face that the Court was without jurisdiction, we apprehend that the Court *sua sponte*, or upon suggestion, might probably dismiss the bill. But the proper method of attack on the grounds set forth, in the motion to dismiss, is by demurrer or plea. 1 Daniel Chancery, 555 630.

The Court upon the case made by the bill had jurisdiction as to citizenship of the parties, and the amount involved. Also the subject matter the removal of cloud upon title.

The grounds of the motion to dismiss are generally the same as those contained in the demurrers, the overruling the latter being the *second* assignment of error. We will therefore argue them together.

Appellants contend that the allegation of the bill, that the land, which includes that in controversy, was *granted* by the Spanish Government to Fish, under whom appellees, complainants below, claim title must be held to be merely an incomplete concession.

This Court in United States vs. Clarke 8 Pet., opinion, page 450 says: "The general word 'grant' may comprehend both the incipient and the complete title." And in Mitchel vs. U. S., 9 Pet., 711: "which words 'grants' or 'concessions' were to be construed in their broadest sense so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect." The authorities cited by appellants are entirely consistent with the foregoing.

Appellant in his argument ignores the allegation of the bill, p. 1, which by demurrer is admitted to be true: "that they (complainants) own and hold title in fee simple as tenants in common, to all that tract, parcel or piece of land," etc., describing it, and further "that the said tract was granted by the Government of Spain to Jose or Joseph Fish, otherwise known as Jesse Fish," from whom complainants show derivation of title. These allegations, taken together, show that the words "granted by the Government of Spain" allege the complete and not the inchoate title.

Appellants contend that the survey of lands and issuance of patents therefor was *prima facie*, a determination by the United States that the concession made to Fish had not been recognized by the Sovereign, against whose rights the claim was sought to be enforced.

While there are no authorities that hold a *survey* to lands to be *prima facie* evidence of title, we do not controvert the proposition that a *patent* of the United States is *prima facie* evidence of title in the patentee of the lands embraced therein, to which the United States had title.

But the *prima facie* case is rebutted by the allegations of the bill of a fee simple title in the Complainants under a Spanish Grant, and p. 3, "that the said patents from the United States and the said deeds of those claiming thereunder, and said entries and selections of the State of Florida, whereby the said defendants claim title respectively, to the said lands as aforesaid are invalid, and do not vest a title in the said defendants to the lands as claimed by them, respectively, as aforesaid, for the reason that the United States, under whom the said defendants claim, did not, at the time of issuance of such patents or at any other time, have or hold title to the said lands, or any part thereof, but that the title to the same is in your Orators, holding and claiming under the said grant of the Government of Spain to the said Joseph Fish, as aforesaid."

We will in another connection show that a *patent* of the United States may be successfully attacked.

It is true that complete grants were recognized by the second article of the treaty with Spain by the cession of all of East and West Florida *exclusive* of *private property*. U. S. vs. Perchman, 8 Pet. 51. But it is not the case, as appellants contend, that only incomplete grants or concessions were ratified and confirmed by the Eighth article of the treaty. The Eighth article is as follows:

> All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the

> conditions of their grants, shall complete them within the terms limited in the same, respectively from date of this treaty; in default of which, the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of his Catholic Majesty, for the cession of the Floridas was made, are hereby declared, and agreed to be, null and void.

The words "shall be ratified and confirmed" are construed to agree with the copy in Spanish which is translated, "shall remain ratified and confirmed."

U. S. vs. Arredondo, 6 Pet. 691. (8--547)

U. S. vs. Perchman, 7 Pet. 51. (8--604)

The Eighth article operated as a confirmation of property rights acquired prior to the date mentioned, whether complete or inchoate to the same extent as the right held under the Spanish Government.

In the case of a conditional grant or inchoate right, is devolved upon the United States to ascertain whether the conditions had been complied with so as to entitle the claimant to a confirmation by Congress, or the Courts, which would operate as a completion of his title.

We quote from the United States vs. Wiggins, 14 Pet. opinion 349:

> The Court held that the application resulting from the Second article being according to the law of nations, that, and the Eighth article, were consistent; and that perfect titles stood confirmed by the treaty and must be so recognized by the United States and in our Courts.

It is idle, in the face of the authorities, to contend that the allegation of the bill that the grant was ratified and confirmed by the treaty, implied a concession or incomplete grant or title.

The language in the Wiggins case that perfect titles were exempt from the provisions of the Eighth article of the treaty and that such article applied to claims whose validity depended upon the performance of conditions, in the light of the decisions cited *supra*, must be held to refer to that part of the Eighth article providing for the completion of the conditions by the grantee, and confirmation by the United States. The Court in this case holding that perfect titles were confirmed by the treaty and "need no sanction from the Legislative or Judicial departments of this country," distinguished them from grants upon condition, which were required to be investigated by the United States, and ratified by the Courts or Congress, if the conditions were found to be complied with.

Appellants cite Menard's Heirs vs. Massey, 8 How. 307, to sustain their contention that no standing in an ordinary judicial tribunal has ever been allowed on these claims until congress has confirmed them. The case cited involved a concession and not a complete grant. What the Court decided was that no suit could be maintained in an ordinary action of ejectment, or for title of any kind, on a concession and order of survey, for want of legal title to sustain it. Such claimants were not regarded as the owners of land until the real title was delivered completed.

Contrary to appellants' contention the Court holds in U. S. vs. Perchman, 7 Pet. 51, that complete titles could be asserted in the Courts independent of the 8th Article, and in U. S. vs. Arredondo, 6 Pet., opinion 741-2, the adoption of the Spanish version that grants of land "shall remain confirmed," and that then the United States by accepting the cession could assert no claim to these lands thus expressly excepted. The proprietors could bring suits to recover them without act of Congress

and any question arising would be purely a judicial one. Anisa vs. New Mexico & A. R. R. Co., U. S. Sup. Court, October term, 1899.

Appellants contend that complainants are barred by the Acts of May 23d, 1828, and May 26th, 1830.

We submit that the allegation of complete title in fee simple in the complainants is sufficient to maintain the bill, and that the question of the bar, if any, by the said act or any defect of title, did not arise at the stage of the case reached by motion to dismiss or demurrer. We will, however, on the argument of the case on the merits, fully discuss the question of a bar as involved in said acts.

There is no allegation in the bill to sustain the contention, as a ground of demurrer: that the bill disclosed that the matters sought to be determined were still pending before the Land Department of the United States, nor is that the fact.

The *second* ground of demurrer is that the bill failed to aver that the claim had been recognized by the United States. While we contend that such allegation was not necessary the bill does allege it, in the allegation of perfect title, and that the grant was ratified and confirmed by the treaty between Spain and the *United States*. The citation by appellants of Doe *ex dem.* Clark vs. Braden, 16 How., 635, does not sustain his contention. The land involved in that case was claimed under title from the Duke of Alagon, whose grant instead of being confirmed was annulled by the treaty.

Following the grounds of demurrer in their order in appellants' brief, the *third* is that the bill showed that the United States had determined the lands to be public lands, but failed to aver any fraud or mistake of law in such determination. There is no allegation in the bill that the United States had determined the lands to be

public lands. Nothing but the inference from the fact that the United States had issued patents therefor, but any presumption of title arising therefrom is rebutted as above shown by the allegation of perfect title in complainants and that the United States never had title to said lands.

The *fourth* ground is that there appeared to have been no survey as a Spanish Grant. We submit that such does not appear by the bill. The bill does not so allege, nor is such inference to be drawn therefrom, nor is the allegation of a survey necessary. The allegation of complete title in fee simple under a Spanish grant ratified by a treaty, implies everything necessary to such title.

The *fifth* ground is that the claim is barred by laches. Like most other grounds of demurrer appellants argue this on an assumption which the bill does not warrant, to-wit: that the Surveyor General was not furnished with a description of the claim to the lands with information to enable him to place it upon the township maps. There was no necessity to aver in the bill that such course was taken by the complainants or those under whom they claim. They allege a complete title.

The *sixth* ground is want of possession sufficient to maintain title to remove cloud.

The bill alleges actual possession in the complainants coming down from Joseph Fish under whom they claim, pp. 2, 3.

The bill also alleges, p. 5., that none of the said defendants are in actual possession of the said lands or any part of them.

A bill to remove cloud may be maintained when the plaintiff has no other than constructive possession resulting from legal ownership in case defendant is not in actual possession. Woodford vs. Alexander, 35 Fla., 333.

The Courts of the United States when investigating titles and decreeing on them, give effect to state legislation and state policy. Holland vs. Challen 110 U. S., 15, (28-52).

The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title. This seisin and possession is co-extensive with his rights and continues until he is ousted thereof by actual adverse possession. U. S. vs. Arredondo, 6 Pet., p. 743 (8-566).

To same effect:

Hunnicut vs. Peyton, 102 U. S. 333. (26-113

Wilkins vs. P. C. Co., 36 Fla., 36.

Caro vs. Pensacola, 19 Fla., 766.

The case of Frost vs. Spitley, 121 U. S. 552, cited by appellants is not in point. In that case the complainant held merely the equitable title, which the Court decided was not sufficient to entitle him to the relief sought.

The *seventh* and last point raised by the demurrer is that the bill avers a grant in excess of a league square and there is no averment that the excess over a league has been confirmed by Congress, or that the lands in the controversy were not within the excess.

The allegation of complete title is sufficient answer thereto, at this stage of the case. This ground and some others raised by demurrer will be argued at length upon the merits. They come up more properly for consideration when the facts are before the Court on the bill, answer and and testimony.

We conclude the argument limited to the motion to dismiss and the demurrer, submitting to the Court that the bill alleges complete title in fee simple in complainants under a Spanish grant confirmed by the treaty, with

continuous possession from time of the grant to the present. That the United States has made patents covering portions of the said grant to the State of Florida; that the claim of title by the State is vested in certain persons, defendants, as trustees, and other defendants, their grantees. That the United States never held title to said lands, and that the said patents and deeds thereunder are clouds upon Complainant's title. And the same prayed to be removed, &c.

We respectfully submit that the bill presents a *prima facie* case for equitable relief, and that it was not error in the lower Court to deny the motion or overrule the demurrers.

The *third* error assigned is that the Court referred the whole cause, both questions of law and fact, to the Master, without the consent of the parties.

The submission to the Master, p. 50, was to take testimony and report the same to the Court, with his findings of law and fact.

Whatever force there might be in the objection of such submission to the Master, if made in time, it comes too late after the Master has acted under the order of the Court, covering a period of six months in taking testimony, at great expense to the parties. If it was proposed to object to the submission it should have been done at the time the order was made, or afterwards by motion to have it modified, prior to the taking of testimony. It will be noted that the order was dated July 27th, 1896, and the Master did not commence to take testimony until November 24th, thereafter. So there was abundant time for defendants to have made their objection to the Court, without awaiting the experiment as to how the Master would find. The parties must, therefore, be held to have

consented to the order of submission to the Master. This submission was merely in aid of the Court, the Master was directed to and did report all the testimony taken by him, and all that was offered and held to be inadmissible. So that the court had the whole matter before it, and was in no way bound by the findings of the Master, either of fact or law. The final decree was rendered after exhaustive argument by counsel.

The *fourth* assignment of error involves the ruling of the Master on admission of testimony.

(a.) The Master admitted the testimony of Mr. Sanchez as to the location of the quarries. The testimony of Mr. Sanchez shows that he was eighty-six years old at that time; that he had had charge of the Anastasia Island property as the agent of Charles M. Furman for many years. There was every reason to presume that he would have knowledge of the location of the quarries which were excepted from the grant. The question propounded to him was, (p. 250) "State as near as you can the location, if you know, of what is or was known as the quarries or King's Quarries, on Anastasia Island." His answer gives the boundaries of the quarries.

We submit that no better evidence was obtainable as to the location of the quarries. It was competent to prove the same by parol, even though the knowledge was by reputation. Boardman vs. Reed, 6 Pet 341 (8–420.) Defendants made no attempt on cross-examination to further interrogate the witness as to his knowledge of the location of the quarries.

Under the same assignment it is further claimed

(b.) That it was error to admit the proceedings before the Board of Commissioners, showing the Fish title as contained in pages 465 to 471. 4 American State Papers. (Duff Green Ed.) The documents therein

shown were duly certified to be a true and correct translation from a document in the Spanish language on file in the office of the Public Archives. 4 American State Papers (Duff Green) 470 Record p. 139.

It was proper, and the uniform custom of the Commissioners, in their investigation of Spanish titles, to set out at length in their records translations of the title papers relied on to support the claim. The whole forms part of their report.

The American State papers were held properly admitted in evidence, Watkins vs. Holman, 16 Pet. 25. 10–873)

While the Court holds that this publication does not make that evidence which intrinsically is not, adds it gives in most authentic form certain papers and documents. These authenticated copies of title papers from the public archives are intrinsically evidence.

So too, the American State papers are held properly admitted in evidence in Bryan vs. Forsyth. 9 Howard 334 (15–674).

In an ejectment suit tried by the Circuit Court of Florida, which involved the Fish title now under consideration, the said Court refused to permit the defendant to read in evidence in support of his title the same record of the Fish title in Vol. 4, American State Papers. Upon writ of error the Supreme Court of Florida (Doe ex dem. Magruder, vs. Doe, 13 Florida 602) reversing the lower court, citing authorities, p. 609, say:

> It is understood that the edition called Duff Green's edition of American State Papers was printed by authority of Congress, and was the copy referred to by the Court in the case just cited. Other editions have since been printed under similar supervision and authority, *and are equally receivable as prima facie of the contents of the originals on file in the*

archives of the Government as though they were authenticated in any other manner recognized by law.

This establishes the rule of evidence in Florida, which should be observed by the Federal Courts.

Even if the Master erred in admitting such record it was harmless error, because the same record, being a certified copy of the originals in the Surveyor-General's office, was afterwards introduced as evidence with a translation of the same.

The other objections argued by appellants apply to the legal effect of the record of the Fish title, rather than its admissibility in evidence, and will be argued in the discussion of the merits.

(c.) The introduction in evidence of the deeds from Julia R. and Irvine K. Furman, Exhibits "E" and "F," pp. 243–245, is claimed as error on the ground that the United States is in adverse possession.

The doctrine invoked by appellants has no application to the facts in this case. Neither the United States nor its grantees had adverse occupation of the property involved. It is wild, uncultivated, unoccupied land. Testimony of Stokely, pp. 142–143.

Julia R. Furman and Richard K. Furman, each held an interest in the property involved, as shown hereinafter. They had constructive possession, not only by the possession of the old homestead on the Island, but also by reason of their title, authorities cited *supra*.

(d) Appellants claim that it was error to admit in evidence Exhibit "U," pp. 266–278, which are certified copies of the original documents in Spanish in the Public Archives in the proper custody of the United States Surveyor-General of Florida, being the muniments of the Fish title, pp. 265–278. Translation of the same pp.

221–223, which is substantially the same as that contained in the American State papers. Insisting that the latter is proper and sufficient evidence of title, as it was objected to, certified copies of the originals by the Surveyor-General were introduced in evidence, out of the abundance of caution.

The time of introduction in evidence is objected to as not proper in rebuttal.

The master may permit plaintiff in rebuttal to put in further evidence to prove his case, though not strictly in rebuttal. Wooster vs. Gumbinger, 20 Federal Reports, 167.

The objection that they showed a concession, not full title, will be met hereafter. If they were but a concession they were, nevertheless, proper evidence of title to that extent. The contention that the documents, or any of them, are mutilated, has no foundation in fact. The original papers are correctly shown by the copies in evidence, are on ordinary fool's cap paper, each half sheet having writing thereon, is numbered consecutively. After the certification signed Jose de Zubizarrata, dated April 20th, 1795, record p. 287, which is the last writing on the half sheet numbered 15, the following half sheet has the outer half thereof cut off longitudinally. The same occurs following the half sheet numbered 18, on which the last writing is the attestation of Zubizarrata to the order of Ortega, dated June 13th, 1795, p. 289, the outer half of the half sheet attached being cut off longitudinally. The severed half sheet is shown by that following in this brief. The part remaining of the severed half sheet is blank. There is no reason, therefore, to presume that there was any writing on the part which was severed. The severance being longitudinal, the reasonable presumption is that this blank half sheet appearing in the papers, it was so cut by the officials, in whose custody

the records were, as to prevent the interpolation of any writing thereon, and evidences good faith instead of fraud.

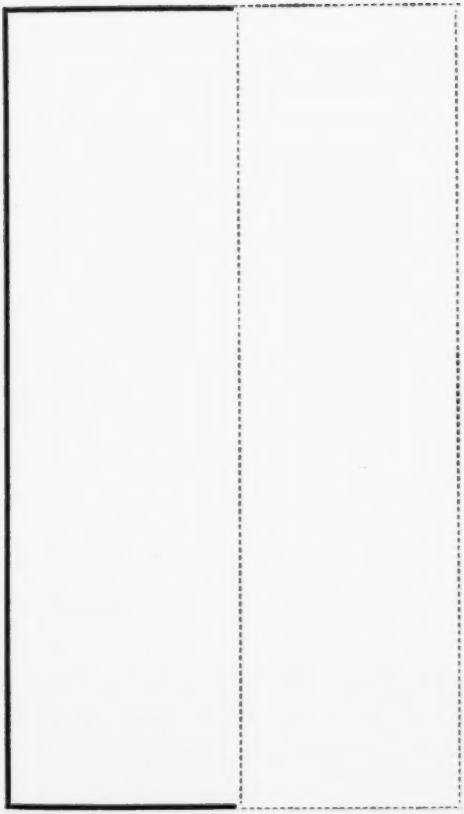
All of appellants' contentions, pages 119 to 125 of his brief and elsewhere therein, as to mutilations, erasures, interlineations, forgeries and spurious documents, have no other foundation to rest upon than these two blank halves of half sheets, which we submit carries with it no presumption against the validity or *bona fides* of the documents. The fact that these ancient muniments of title are found among the Spanish Archives in the proper custody of the Surveyor-General, is *prima facie* that they are genuine. 1 Greenleaf, Ev. Sec. 142. A translation of the same papers were before the Board of Land Commissioners made by their secretary, with their access to the originals, and they decreed the same to be a valid Spanish grant. As to the objection that there is no proof of the documents, we submit that the same would be impossible at this late day, and is not necessary.

Ancient instruments are presumed to be genuine, and prove themselves coming from the proper custody. 1 Greenleaf, Ev. Secs. 21-142.

Appellants further contend that it was error to reject the evidence of Dunham, County Clerk, by whom it was sought to prove a record of the Probate office.

Dunham was Clerk of the Circuit Court. Rec. p. 191. The record sought to be introduced was a record of Probate proceedings. Of these the County Judge has jurisdiction and custody of the records.

The Constitution of Florida, Art. V., Sec. 17, provides that "The County Judge shall have jurisdiction of the settlement of the estates of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to Courts of Probate."



Revised Statutes of Florida, Sec. 1814, provides that "All wills, of which probate shall be granted, shall be deposited in the office of the County Judge, and by him fairly and correctly recorded in a book kept for that purpose, together with letters testamentary and of administration granted thereon."

Dunham was not the proper custodian of the record, and it was properly rejected.

As will be further shown, the testimony is not material. We deem it unnecessary to take up the time of the court in further answering to objections to the Master's rulings on testimony. It will readily appear that much testimony sought to be introduced by defendants, was not material to the issues in this cause, and could not bind the parties thereto, and was properly ruled out by the Master. All the evidence offered, that admitted as well as that rejected, appears in the record, and was before the Court for consideration. If evidence was rejected which should have been admitted, it will not entitle appellants to a reversal of the decree in this cause unless such evidence shows the decree erroneous.

ARGUMENT ON THE MERITS.

We will now proceed to discuss the case upon its merits, under the *fifth* and *sixth* assignments of error, to-wit: that the Court erred in sustaining the findings and opinions of the Master.

We respectfully ask attention of the Court to the report and findings of the Master, Record, p. p. 51 to 65, and to his lucid and able discussion of the case in his opinion, Record, pp. 65 to 86, taking up, as he does, the many points raised by the defendants.

The main argument of counsel for appellants is directed to a discussion of conclusions of fact found by the Master, and confirmed by the Court, which are asserted to be erroneous, but the record contains evidence upon which these conclusions can be supported, they are presumably correct, and should not be disturbed by this Court on appeal.

Furrer vs. Ferris, 145 U. S., 132;
Warren vs. Keep, 155 U. S., 265;
Davis vs. Schwartz, 155 U. S., 631;
Crawford vs. Neal, 144 U. S., 585.

We contend:

1ST. THAT THE WHOLE OF ANASTASIA ISLAND, EXCEPT THE QUARRIES, WAS GRANTED BY THE SPANISH GOVERNMENT TO JOSE FISH.

2ND. THAT THE SAID GRANT TO FISH WAS A PERFECT AND COMPLETE TITLE.

3RD. THAT PERFECT OR COMPLETE TITLES WERE CONFIRMED BY THE TREATY WITH SPAIN CEDING THE FLORIDAS.

4TH. THAT SUCH CONFIRMATION HAD THE FORCE AND EFFECT OF AN ACT OF CONGRESS.

5TH. THAT THE UNITED STATES DERIVED NO TITLE TO THE FISH GRANT BY THE CESSION OF FLORIDA.

6TH. THAT THE ACT OF MAY 23D, 1828, DID NOT OPERATE TO CONFISCATE, OR VEST IN THE UNITED STATES LANDS HELD BY PERFECT SPANISH TITLE, OR TO PREVENT THE ASSERTION OF SUCH TITLE IN THE COURTS OF THE

COUNTRY AGAINST ADVERSARY CLAIMS, NOTWITHSTANDING PROCEEDINGS WERE NOT INSTITUTED THEREON WITHIN THE TIME LIMITED BY SAID ACT, OR AS EXTENDED BY THE ACT OF MAY 26TH, 1830.

7TH. THAT THE COMPLAINANTS DERIVE TITLE FROM SAID JESSE OR JOSE FISH.

Incidental questions will be discussed as they arise under the foregoing heads.

FIRST, THE WHOLE OF ANASTASIA ISLAND EXCEPT THE QUARRIES, WAS GRANTED BY THE SPANISH GOVERNMENT TO JOSE FISH.

The title of Fish is shown by American State Papers (Duff Green Ed.), pp. 465 to 471, Record, pp. 125 to 141, also certified copy of the original documents in Spanish from the Public Archives in Surveyor General's office, pp. 265 to 278, and translation of same, pp. 278 to 291. This translation is by witness Fritot, p. 221, and is substantially the same as that found in the American State Papers.

The said record is, in substance, as follows: (Referring to the Fritot translation, commencing p. 278), Jose, or Jesse, Fish, as he is also called, petitions the Governor setting forth that he is a native and resident of the city. That at public auction of the property of his deceased father, for payment of his creditors, he purchased for $1,605.00 the "Verjel": That persons are cutting timber on the property and prays to be declared the owner of the lands, which his father possessed annexed to the Verjel, which amounted to 10,000 acres, whether as a new settler or by right of his deceased father. This appears to be dated December 2nd, 1796, but is evidently an error,

probably clerical, as the document is headed Florida, 1794. The order made thereunder by Quesada, the Governor, which is on the same sheet, is dated December 15th, 1794, and the dates thereafter are generally in regular sequence. The whole proceedings being closed July 10, 1795, when Fish was placed in possession under grant, and by order of the Governor.

Quesada, by said order following, directs the Assessor General to consult with him. The said Assessor General, Licentiate Josef de Ortega, on the same day, states: that if the memorial was directed to the preventing of persons cutting timber on the land, or to recover them according to his titles, he would consult with the Governor on the interlocutory decree, according to law, but being for a grant of the lands which his father possessed, the sale not setting forth the boundaries, it remains for the Governor to assign them to him as a new settler, which the possession of his father gives him a right to preference or to distribute them to him as the Governor thinks proper.

The Governor, on the same day, directs proof to be made. Thereupon John Leslie testified that in the time of the British, he valued the lands, houses and lots of Jose Fish, deceased, in his possession, among them was the plantation named the Verjel, which his son by the same name now claims, which he had with lawful title from the former Spanish Government, and it is known to him that he had 10,000 acres, more or less, in peaceable possession. Lorenzo Llanes, testified, in substance, the same, except as having valued the property. Manuel Solano testified to the possession of Fish (the father) on the Island of St. Anastasia, of the plantation called the Verjel, 10,000 acres; that during the time of the old Spaniards he went with Don Jose de Leon, by command of the Government, to separate the King's quarries on the island in order to grant the balance to Don Jose Fish, who solicited it, and

it was actually granted him after having made the separation. He again went, with the engineer, Don Manuel de la Roque, and two other workmen, to designate the old quarries, which they did, and set up four stakes to mark out the land of the King's on the island, Fish remaining owner of the balance as he had been until then.

The Governor then made the following order:

> St. Augustine, Florida, 12th February, 1795.
> The foregoing proof being complete and in order to issue a decree, now fully let the whole be submitted to the collector of the exchequer, that as fiscal of it, he may represent as convenient in the discharge of his functions; and with what he may say let it be brought forward.
>
> QUESADA.

The Fiscal Gonzalo, Zamorano thereupon, under date of February 27, 1795. reports: that, at the auction sale, at which Fish purchased, the boundaries of the land were not taken into consideration, only the valuation of the trees. That he is of the opinion that, although Fish proves by the evidence he presented that his father possessed during the time of the British and Spanish Governments all that land, he ought not to have a right to anything more than the sale of the orchard, that the remainder of the 10,000 acres ought to be sold as belonging to his father, for the benefit of the creditors, Fish having preference for as much as another would give, and that there should be annexed to the testimony the inventory valuation and sale of the orchard. That if Fish has occasion for public lands he finds no objection that the Governor should grant them to him as a new settler.

Governor Quesada then makes the following order:

> Let this testimony which is indicated be placed in co..in..tion and with it those proceedings returned

to the Assessor-general, that he may consult with me as to what is proper as respects the other points to which the foregoing fiscal representation refers. It is thus decreed and ordered.

Then follows a certified copy of the proceedings involving the valuation of the property and auction sale. Governor Quesada then makes the following order:

The preceding document having been examined and found correct, it was passed over to Don Jose Fish, and was thus ordered and decreed.

Fish, thereupon, following up the proceedings, presents his amended petition to have granted him the 10,000 acres which his father possessed, at the place called the Verjel, claiming that he bought the whole and would not have paid that price for the trees alone, or the land on which they stood. That he purchased, impelled by the great attachment which he had for the place where he was born, brought up and educated, the ancient residence of his parents, and his sisters, who are under his protection and charge, &c. He specifically prays a grant of "the said island."

The whole is then passed over to the fiscal by the Lincentiate Ortega, who signs in consequence of the illness of the Governor, April 17th, 1795. There next appears in the record a communication from Fish to the Governor, dated March, 1792, the day after his auction purchase, stating his purchase, asking to be put in possession of the island of the Verjel which his father possessed.

This is certified to be a true copy of the original in the proceedings of the creditors of Jose Fish, deceased.

The Fiscal attorney, Jose Antonio de Yguinez (erroneously copied in record Yginns) to whom the whole proceedings under the said Fish petition were referred,

thereupon, May 4th, 1795, reports that the Fiscal had sufficient reason for his decision of February 27th, 1795, to consider Fish only the owner of the land and trees mentioned in the valuation, because until then nothing appeared of the number of acres of which the said Verjel consisted, a defect of the appraisers, who should have given a particular designation of the land which properly belongs to the deceased Fish. That in virtue of the proof which Fish made that the "Verjel" consisted of 10,000 acres of land, and he undoubtedly was of the impression that the 10,000 acres which his father enjoyed would be included in the sale. That error or negligence of the appraisers ought not to prejudice the rights of Fish. Advises that the 10,000 acres be marked off and Fish given possessson with notice to the defender of the estate of the deceased Fish.

Then appears the following:

> Having examined the proceedings it was decreed and ordered by Senor Don Bartolome Morales, colonel of the infantry of the royal armies, Commandant of the Third Battalion of Cuba, which garrisons the city of Saint Augustine, Florida, and Political and Military Governor of it and its province, he signs it on account of illness of the incumbent, on the sixteenth day of May, 1795 ; which I attest.
>
> MORALES,
>
> Licentiate Ortega.

Before me,

JOSE DE ZUBIZARRTA

Notary of Government.

Notice was then given to the defender of the estate of Don Jose Fish.

This official was Don Rafael Saavedra de Espinosa, Attorney General, &c., who reports to the Governor that he had examined the proceedings. That Fish proceeded inadvertently in the purchase which he now seeks to

remedy. That he agrees with the well founded exposition of the first officer of the royal comptroller's office, Don Jose Antonio Yguiniz, and suggests that the Governor may grant to Don Jose Fish the 10,000 acres of land which his deceased father possessed.

Then follows the grant, to-wit:

Having examined these proceedings and seen the proof adduced in them by Don Jose Fish, it appears not only that his father, of the same name, possessed the ten thousand acres of land since the time of the old Spanish and in that of the British dominion, which possession he claims at the place named "the Veriel," which he purchased at a public sale, but also that he offered a bid for the said land under which his purchase ought to be understood, which defect by not explaining it thus and at the time, should not be prejudicial to him, and which was given cause for this litigation. His excellency says that declaring as he declares now, and consequently orders that, whether from the right that Fish has from the purchase of said land for the sum of $1,605, as shown by the public sale of the "Verjel," or by the right of ancient possession of his father of the mentioned 10,000 acres of land, or, finally, in consequence of the petition of Fish that they should be granted him as a new settler, he be placed in possession of said lands, which appears his father possessed and is already laid off with the exception of the quarries, and also was not granted to his said father, and which the King has reserved, renewing the boundaries if necessary at the expense of the interested and by the said appraiser, Don Manuel Solano, who, in time of the old and new Spanish possession of this province laid off, by order of the government, the aforesaid quarries in order to give possession of the lands which he claims to the father of the petition and which was done then, and let them be granted to him on the terms above set forth and giving him possession of the present notary,

who is commissioned for the purpose when with the said appraiser and some other workmen that may be necessary, they shall assist some one who represents the royal treasury, a person whom the minister of the royal domain may depute for this purpose; all of which shall be made to appear on the proceedings and the taxation of the costs, which the intereste l party shall satisfy and this proceeding shall be held as concluded. It was thus decreed and ordered by Senor Don Bartolome Morales, colonel of the infantry of the royal armies, commandant of the Third Battalion of Cuba, which garrisons this city of Saint Augustine, Florida, and political and military governor, pro tempore. of it and its province, he signs it on account of illness of the incumbent and with the advice of his honor, the assessor-general, on the 19th of June, 1795, which I attest.

LICENTIATE JOSEF DE ORTEGA.

BARTOLOME MORALES.

This is followed by a report which shows that in accordance with the order of the Governor, Don Manuel Solano, Don Jose Lorente, chief master of the royal works, and Don Tadeo deArribus, officer of the royal comptroller's office, and Jose de Zubizarrata, the notary, being in the plantation called the "Verjel," on the Island of Saint Anastasia, on July 10th, 1795; placed stakes marking the boundaries and separating the quarries, "Making known that all the rest was what belonged to Don Jose Fish," and gave him quiet and undisputed possession of the same without opposition.

Counsel for appellants contends, with apparent seriousness, that the words of the order of Governor Quesada of March 26th, 1795: "Having been seen that it was passed over to Don Jose Fish, and was thus ordered and

decreed" (translation in American State Papers, Record, p. 132), was a decree denying the petition of Fish, and that all following is "spurious."

If his excellency so intended, he was most unhappy in the selection of language to express his meaning. The antecedent interlocutory orders made by him are intelligible and in apt language, and in each the word *decree* or *decreed* is used. The language of this order in the Fritot translation, p. 285, is: "The preceding document having been examined and found correct, it was passed over to Don Jose Fish, and was then ordered and decreed." This we submit is the more full and intelligible translation, and should be accepted as correct. The preceding document referred to, was the record of the appraisement and auction sale, which, under the previous order, had been introduced in evidence in the proceedings. "It," i. e. *said record*, was passed over to or submitted to Fish, as he was given notice of every other step in the proceedings, previous and subsequent to this order. The language of the order will bear no other reasonable interpretation, and by no possibility is susceptible of that contended for by appellants. This having been submitted to Fish, is followed by his additional or amended petition, in which this language is used: "In consequence of the proceedings, which I am following up."

We have already submitted our views as to the claim that the documents, or any of them, are spurious or forgeries. The continuation of the proceedings are in regular order, and evidence the same care and consideration as those up to this last order of Quesada. To which we may add that the report of the Register and Receiver introduced by defendants, p. 170, referring to documents in the Public Archives, states that there were two offices under the Spanish Government, "the escribano's office,

which was regularly kept *in books stitched together* in consecutive pages, with all the records closely following each other, so as to make it extremely difficult to interpolate a grant. For the records of this office we have high respect; it seems to have been a place where all grants have been recorded when fully matured. The other, the office of the governor's secretary was of a different character; here all the papers were in loose detached sheets, easy to have been taken away or to have a forged document thrust among them without the power of detection." Mr. Dewhurst, counsel for defendants, testifies page 216, referring to the papers of Fish in the public archives: "The document is fastened together; the sheets are fastened together by thread." Said counsel states in his brief, p. 119 (which is a fact), each leaf has been marked in regular sequence. It appears, therefore, that the Fish documents instead of being spurious are of those entitled to "high respect." Had Fish undertaken to perpetrate a forgery, he would doubtless have forged the name of Quesada instead of Morales.

The master in his opinion, p. 74, says:

> The proceedings bear upon their face every stamp of genuineness, the testimony shows that they were known and officially participated in by all the members of the Governor's official household; that Fish's possession and claim was notorious and open from 1795 'til after the cession, and if improperly or surreptitiously made, it was within the province, as it was presumably within Quesada's knowledge, to have disallowed it.

The burden of proof is upon the attacking party, and must be sufficient to overcome the *prima facie* presumption arising from the face of the papers. U. S. vs. Arredondo, 6 Pet. 691.

Fraud is not to be presumed, but ought to be proved by the party who alleges it. Ib. 716.

The grant embraced the whole of Anastasia Island, except the quarries.

The plantation of the "Vergel", or orange grove, 10,000 acres, which was possessed by Fish senior, is shown to be on Anastasia Island. Testimony of Solana, p. 281. Fish in his petition, p. 286, setting forth his father's possion, prays for a grant of "the said Island." The grant has reference to the petition and other antecedent proceedings.

The land is referred to in the proceedings and grant as 10,000 at the place named the Verjel, which had been possessed by Fish senior. Under order of the Governor, the officials went on to Anastasia Island, staked of the boundaries of the quarries, put Fish in possession, "Making known that all the rest was what belonged to Don Jose Fish." The whole island contains but 8,041.58 acres. Testimony of Hopkins, p. 120, so that the call for 10,000 acres more than covered it. It was doubtless nearer that area at the time the grant was made, as there is testimony of the encroachment of the sea.

The claim of Sarah Fish, mother of the Grantee, and his heir at law, was for "the island lying in front, (i. e. to the East) of the city of St. Augustine, running South above eighteen miles, more or less, along the East Bank of the River Matanzas, known by the name of the Island of St. Anastasia, supposed to contain ten thousand acres." Acting upon this claim, the Board of Land Commissioners found it to be "a valid Spanish grant for ten thousand acres." And they report the same, p. 125, 10,000 acres, *Anastasia.* The decree of the commissioners can refer to no other than the land described in the petition of Mrs.

Fish. The contention of counsel for appellants that this grant of 10,000 acres meant but the cultivated or inclosed grounds around the Fish homestead of about 100 acres, on what he claims to be Fish Island, on which it is shown that no quarries exist, p. 149, cannot be seriously entertained.

Counsel, p. 117, of his brief, says: "It is beyond belief that one of the chief officials of the King of Spain should, over his signature in an official report, declare his belief that the proof in this record of Fish had proved that the site named the orange grove, consisted of 10,000 acres, &c." The language used by the official referred to the comptroller or Fiscal (Fritot translation, p. 288) is:

> Under the circumstances the Fiscal attorney thinks that in virtue of the proof which Fish has made, in the proceedings, he proved that the place named the Verjel consisted of 10,000 acres of land and that when he bought it he was undoubtedly under the impression that the ten thousand acres which his father enjoyed would be included in the sale.

The Spanish word "Verjel", which is retained in the Fritot translation, translated "Orange Grove", by Fatio, in the American State Papers, was undoubtedly used as the designation of the Fish possessions on Anastasia Island. An examination of Spanish grants shows that grants, containing thousands of acres of land, were designated by the name of some spot or location therein, covering but a small space: e.g. The grant to Clarke, 16,000 acres "at a place called White Spring", U. S. vs. Clarke, 8 Pet. 441. The said Spring, now known as Green Cove Spring, actually covers but a fractional part of an acre, and the limits of the grant extend five miles therefrom.

Grant to Huertas, 5,000 acres at a place called Tocoy, U. S. vs. Huertas, 8 Pet. 489.

Grant to Perchman, 2,000 acres in the place called Ockliwaha, U. S. vs. Perchman, 7 Pet. 54-55.

It is contended that Fish did not pray for a grant, but only possession. This is not supported by the evidence. In his first petition, on which the proceedings commenced, believing that he had right of title by this purchase, he prayed to be declared the owner of the land. The opinion thereafter having been rendered that he had only purchased the fruit trees, or land on which they stood, he makes his amended petition using this language: "I pray and ask your excellency to be pleased to grant me the said island as I have solicited."

Counsel for appellants contends that the alleged grant of 10,000 acres was contrary to the laws and ordinances existing in the province of Florida at that time.

He cites White's Recopilacion, 274, et. seq.; 3 American State Papers, 624–626, whereby he apparently seeks to show that lands were only granted under what are termed "head rights", that is, so many acres for the head and each member of his family and laboring hands.

Reporting the order of Governor Quesada, of November 20th, 1790, on the subject the Land Commissioners say, "it must be constructed to relate to emigrants in general, although it was made to apply to those cases of residents who had not received their titles in consequence of the prevailing uncertainty as to the quantity they should receive." 3 Am. St. Papers, 626.

In the report of the said commissioners, including this and other grants in excess of 3,500 acres, 4 Am. St, Papers, 276, record p. 122, 123, they state that they have searched in vain for any limit to the authority of the

Governors of East Florida to grant lands. Referring to the head right rules of Governor Quesada, say: "nevertheless, it is found Governor Quesada made grants in violation of this order." That the Governors were charged to promote population and to that end find them giving grants for the "purpose of agriculture, pasturage, grist and saw mills, as well as indemnity for losses, and for military services, each of which seem to be embraced in the discretionary exercises of gubernatorial power."

The authority of the Spanish governors of East Florida to grant lands without limitation, and in excess of the royal orders and rules as to head rights, has been repeatedly decided by this Court, against the contention of eminent counsel, notably Hon. R. K. Call, whose opinion is relied on by appellants.

U. S. vs. Arredondo, 6 Pet., 691 (8-547);

U. S. vs. Perchman, 7 Pet., 51 (8-604);

U. S. vs. Clarke, 8 Pet., 438 (8-1001);

U. S. vs. Rodman, 15 Pet., 130 (10-685).

The Arredondo grant was for 289,645 acres. The opinion in this case fully discusses the power of the Spanish governors and *prima facie*, validity of grants made by them. Says Justice Baldwin, 6 Pet., p. 727:

> The public acts of public officers purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be an usurped, but a legitimate authority, previously given or subsequently ratified, which is equivalent. Page 728. The acts of public officers in disposing of public lands by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title.

In the Perchman case, says Chief Justice Marshall, 7 Pet., 96:

> The attorneys contend that the royal order of the 29th of March, 1815, empowered the governor to grant so much land only as, according to the established rules, was allowed to each settler. This did not exceed one hundred acres to the head of a family, and a smaller portion for each member of it.
>
> The extraordinary facts that an application for two thousand acres should be founded on an express power to grant only one hundred; that this application should be accompanied by no explanation whatever, and that the grant should be made without hesitation, as an ordinary exercise of legitimate authority, are circumstances well calculated to excite some doubt whether the real character of the transaction is understood, and to suggest the propriety of further examination.

In the Clarke case, being a grant for 16,000 acres, the opinion of Chief Justice Marshall, 8 Pet., pp. 447 to 464, is full and elaborate on this question. The grant to Clarke refers to the royal order of October 29th, 1790, providing for grants to foreigners according to the workers of each family. Says the Chief Justice, p. 448:

> It is too plain for argument that if the validity of the grant depends upon its conformity with the royal order of 1790, it cannot be supported. But we do not think it depends upon that order.
>
> Although the order is recited the grant does not profess to be founded upon it.
>
> Page 451: These titles are to be valid to the same extent as if the territories had not been ceded. What is that extent? A grant made by a governor if authorized to grant land in his province is *prima facie* evidence that his power is not exceeded.
>
> * * * * * * *

> Such a grant under a general power would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted that, so far as we may reason on general principles, that in a Spanish tribunal a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title.
>
> Page 455: We do not find any limitation in the royal orders restricting the power of the governors to a league square in their grant.

In the Rodman case the grant was for five miles square (16,000 acres). The grant in this case also referred to the said royal order. Say the Court, p. 15 Pet., 138,

> That the governor had power to make the larger grant, cannot be denied. It is to be found in the laws of the Indies, in the various regulations under which they granted lands in Florida for more than forty years, sanctioned by the King of Spain, and the authorities representing him in Cuba, the Floridas and Louisiana. The power of the governor in this respect has been frequently affirmed by the decisions of this Court, in cases growing out of the eighth article of the treaty with Spain.

The grant to Fish is further attacked by appellants on the ground that it was made by *Morales*, instead of Quesada, the incumbent of the gubernatorial office. In the document making the grant, and in the preceding order, Bartolome Morales, besides his military title declares himself to be political and military governor of St. Augustine, Florida, and its province from the illness or indisposition of the governor.

We are met with the objection that there is no proof of the indisposition or illness of the governor. To this we reply that such fact is abundantly proved by the docu-

ments in evidence, not only those signed by Morales, but also statements of the Assessor General, Licentiate Ortega, in his order of April 17th, p. 286, and by Yguinez, attorney fiscal of the royal revenue, under date of May 4th, p. 287. If the documents are properly in evidence, argument as to which is made *supra*, they are proof of all material facts set forth therein.

The Morales was performing the duties of governor at the time, and that he was so regarded by the officials and others, there can be no doubt. His previous order and the decree making the grant are countersigned by the Licentiate Ortega and attested by the notary of the government, Jose de Zubizarrata, the same officers who countersigned and attested the orders of Governor Quesada. Espinoza, the attorney general and defender of the estate of Fish acts upon the order of Morales, made as political and military governor, as do the officials and Solano, whom he orders to lay off the quarries and put Fish in possession of the balance.

There is every reason for the presumption that Quesada was, or became, aware of the final determination of the proceedings which had been pending before him, and fully acquiesced in the same.

It is uniformly held that the acts of *de facto* officers are valid and cannot be attacked collaterally.

Cock vs. Halsey, 16 Pet., 71;

Mahoney Mining Co. vs. Anglo Cal. Bank, 104 U. S. 192.

Ralls County vs. Douglass, 105 U. S. 728;

Mechem Pub. Off. Secs, 318–320.

In order to prevent a hiatus, it is usual in all governments to provide for some one to discharge the duties

of the head of government, during the disability of the incumbent. U. S. Constitution, Art. 2, Sec. 5.

Constitution of Florida, Art. IV., Sec. 19.

Public officer who has acted without objection from the public is presumed, until the contrary is shown, to have been duly appointed. Throop Pub. Off. 300.

Cases already cited as to the presumption of the validity of the public acts of public officers, apply equally to this point.

"The presumption arising from a grant makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it." U. S. vs. Peralta, 19 How., 343.

The opinion of the Master p. 70, that the power to grant land was conferred, not upon the Governor, but the office, as to which appellants take issue, must be construed to mean that the authority was not conferred upon the *individual*, but upon the *official* exercising the duties of office. If upon the individual, and not the official, the power would still continue until revoked, whether he held office or not. And a special Royal order would have to be made each time a new Governor went in office. There is nothing to show that such course was pursued. The authorities cited by the appellants' counsel on this point, sustain our contention that the power was vested in the official and not the individual.

We admit that there was no such officer as Deputy Governor in Florida, and make no claim that Morales was such official, but for the time being, he was the acting Governor of the province of East Florida, and the lawful authority of the King, vice Quesada, disabled by illness.

It is also contended that the fact that Fish received a *head rights* grant, is evidence that the Anastasia Island grant was not made to him. As before shown, the latter is not sought or claimed as a head rights grant. There are various instances of head rights grants and grants on other considerations having been made to the same individual, e. g., head rights of 1,000 acres to George Fleming, 4 Am. State Papers, 197, and a grant to the same individual for 20,000 acres, 3 Am. State Papers, 722, which was held valid by this Court, 8 Pet., 478.

To Charles Seton, Head Rights Grant, 1,400 acres, 3 Am. State Papers, 671; 4 Am. State Papers, 282, 437–8. To the same individual grants for 600 acres and 16,000 acres, 3 Am. State Papers, 671; 4 Am. State Papers, 278–402; 5 Am. State Papers, 73–5. U. S. vs. Seton, 10 Pet., 307.

Other cases could be mentioned.

Nor is there merit in the contention of appellants that later small grants were made on Anastasia Island to Rodriguez and Sanchez, is evidence against the validity of the Fish grant. Not infrequently it is found that a piece of land is covered by two or more Spanish grants. The rule is that the oldest valid grant has the preference. Each of said grants (Rodriguez and Sanchez) was but a concession, and "without injury to another." Neither of them is involved in this litigation.

Appellants sought to introduce a list of grants made under Royal order of October 29th, 1790, to show that the Fish grant was not contained therein. Such order, it will be remembered, is the head rights order heretofore noticed: Also a list of grants under order of 1815,. pp. 159–164. This testimony was properly rejected by the Master as the grant to Fish was not a head rights grant, and made in 1795, could not be under the order of 1815. As shown in the Arredondo, Perchman, Clarke and Rod-

man cases, cited supra, the grant is not invalid because not made under either of said orders.

The contention of R. K. Call on this subject, pp. 157–158, was the same which he made against the validity of the Clarke and other grants, against which contention this court decided.

The statement that the Fish grant was the largest ever confirmed by the Spanish authorities until 1816, is an error. The Fatio grant was for 10,000, during the British occupancy, and was confirmed by the Spanish authorities, U. S. vs. Fatio, 8 Pet., 492.

But whether the largest or smallest grant is not material, under the decisions that the authority of the Governors was without limit "for more than forty years." The correspondence between Colonel Butler and Governor Coppinger at the time of the cession, pp. 152–153, was sought to be introduced in evidence and claimed by appellants to show that Anastasia Island was public property. The information sought by Colonel Butler was as to what islands were *dependent* upon the province. That merely referred to the sovereignty and not to the ownership of the land. The Governor says that all of the islands except Amelia and St. Anastasia (improperly printed *St. Augustine* in the record), are nearly without population, showing that those two islands were populated. The Court will take judicial notice that the town of Fernandina was on Amelia Island, so that the contention that the correspondence showed that there could not be a grant on one of the islands is not well taken. Defendants' own testimony contradicts this by showing other grants, Rodriguez and Sanchez on Anastasia Island.

There are other grants on the Islands of the East Coast of Florida, among which we may mention the grant to James A. Hutchinson, of an island since known as Hutchinson's Island, 4 Am. State Papers, pp. 438–439.

Counsel for appellants continuing to indulge in speculations against the probabilities of the grant, states that there were two fortified places on the Island in which the Government kept small garrisons, referring to report of Governor Cespedes, p. 347. In said report there is no mention of a fortification on the islands, but a stone tower used as a lookout for vessels, and close thereto a powder house guarded by six soldiers, etc. He also mentions another round tower inside of Matanzas bar, which in flood tides is surrounded by sea water, showing that it is not on Anastasia Island. Complainants' Exhibit "J," which is the map of the U. S. Survey, including the Southern part of Anastasia Island, shows an old Spanish fort near Matanzas inlet, on the *west* side of the river, opposite said island.

The Court will take judicial notice, as a historic and geographic fact, that the fort, which protected the City of St. Augustine was a formidable fortification for those times, at the north extremity of the old City, facing the inlet known as Fort San Marco, now as U. S. Fort Marion. This and not the old lookout tower on Anastasia Island was the protection of the city and defense of the Spanish possessions in Florida, so far as that city was involved.

It appears from the testimony of the defendants' witness, Tony Huertas, p. 205, that this old lookout house was the superstructure of the old light-house, which stood at the north end of the quarry reservation, and therefore not included in the grant.

Even a substantial fortification within the limits of a grant does not invalidate the grant as to the portion outside thereof, Mitchel vs. U. S., 9 Pet., 711.

The grant to Fish would in no wise interfere with any protection afforded by the island.

The validity of the grant to Fish was recognized and affirmed by Congress.

The claim of Sarah Fish, as shown, was for the Island of St. Anastasia, except the King's quarries. The commissioners acting thereon found it to be a valid Spanish grant, and recommended it to Congress for confirmation. The act of May 23d, 1828, confirmed all grants recommended by said commissioners for confirmation. It is true the act attempted to limit such confirmation to a league square, yet it was, nevertheless, a recognition of the validity of the grant, and, as will be shown hereafter, Congress possessed no power to divest the grantee, or those claiming under him, of any portion of his property.

Second—THAT THE SAID GRANT TO FISH WAS A PERFECT AND COMPLETE TITLE.

Appellants' Counsel introduced and sought to introduce much testimony, and makes an extended argument as to the form and what constitutes a royal title. Much of this was testimony of Alvarez and other witnesses given in litigation, to which no party of this suit was a party or privy; reports of R. K. Call and others, which were matters of opinion. Objections of Complainants thereto were properly sustained by the master. The same, however, appears in the record. Alvarez especially states the different steps or proceedings to procure a royal title. A form of a royal title to McQueen by Governor White, made in 1804 is shown as an illustration. What is technically known as a royal title appears to have been under the royal order of 1790 or that of 1815. Alvarez's testimony p. 170. "There is also a peculiarity in the phraseology of a royal title. In all grants of this nature, the legal right to grant the land is asserted." Report of Commissioners p. 123.

A royal title was under the royal order providing for grants in area corresponding to number of family and slaves for settlement. We do not controvert that the proceedings under the royal order was first the petition, then the concession or granting of the petition upon the conditions of settlement, or otherwise, or providing for a survey to segregate the land to be granted from the public domain if necessary, and when the conditions were complied with and the survey, if required, made, followed the royal title or complete grant.

The error of appellants' counsel is that all complete or perfect grants must necessarily be preceded by a document or order styled a concession. It might as well be argued that, because there are many instances of contracts to convey land upon payment of money, or the performance of other conditions, which when performed are followed by deeds of conveyance, that a deed of conveyance to be valid must be preceded by such contract. We find nothing in the Spanish law which in all cases requires a preliminary concession before the complete title.

The distinction between a perfect or complete title and a mere concession or inchoate title, is that the former is without conditions to be performed and without the necessity of a preliminary survey to segregate the land granted from the public domain, while the latter concedes to the grantee the right which, upon the performance of conditions, or a survey, when necessary, will entitle him to a full title.

In U. S. vs. Clarke, 8 Pet. we quote from the opinion p. 467: "The grant which constitutes the foundation of petitioners' claims, is a complete title subject to no condition whatever." So in U. S. vs. Wiggins, 14 Pet. 334, the distinction is drawn between perfect or complete titles and grants upon conditions to be performed. Say the Court, p. 347, "The construction or the treaty being

settled, a leading inquiry in the cases referred to was, were they perfect unconditional Spanish grants?" P. 350, "There were at the date of the treaty, very many claims whose validity depended upon the performance of conditions in consideration of which the concessions had been made and which must have been performed before Spain was bound to perfect the titles."

When a certain area was conceded but not separated from the public domain by a survey or natural boundaries, then a survey became necessary before the perfect title issued.

"A grant delivered out for survey, meant not, as with us, a perfect title, but an incipient right; which, when surveyed, required confirmation by the governor." U. S. vs. Hanson, 16 Pet. 200.

Let us subject the Fish grant to the above test. No conditions were imposed upon Fish, which were to be complied with before the grant should vest. It is true he was directed to pay the cost of the remarking of the boundaries, but that was not a condition of the grant.

Was a survey necessary at this time to segregate the land granted from the public domain? We have shown that the grant was of the whole Island with a reservation of the quarries. It is shown by unimpeached evidence in the proceedings upon which the grant is based, that the quarries had twice before been separated from the residue of the land, once at the time of the old Spaniards in order to grant the remainder to Don Jose Fish (Senior), and again the second year after Spain resumed her possession of the province by the Engineer Don Manuel de La Roque, with whom the witness Solano was. The grant itself recites that the quarries and part not granted were twice laid off. No new survey is directed, but simply that the boundaries be renewed if necessary, that is, re-establishing the stakes or

monuments which had previously marked the boundaries if found necessary to do so, and Fish given possession. The land grant was an island having a natural boundary, which as completely separated and segregated it from the public domain, the reservation of the quarries having been laid off and properly marked, as any additional survey could possibly have done. D'Auteriere vs. U. S., 101, U. S. 700 (25-869); U. S. vs. Peralta, 19 How., 343 (15-678), opinion p. 349.

Counsel for appellants seeks to discredit the marking of the quarry boundaries, claiming that it was not done by a government official, but by Solano, a private citizen. The facts are that it was done by one or more government officials, Solano being present the second and third time doubtless because of his knowledge by reason of having participated in first laying off the quarries.

Venancio Sanchez, an aged citizen, who had been in charge of the Fish grant for many years, and familiar with the property, testifies p. 250, to the lines of the quarries, the southwest corner being marked by a pile of stones. This is consistent with the description of the petition of Mrs. Fish, pp. 125, 126, who was the widow of Fish, Senior, and the mother of Fish, Junior, living on the island at the time of the grant. Harrington testifies, p. 147, after diligent search, that he found two piles of stone which were about the location placed by Sanchez. Harrington further states that he heard much talk of these piles of stone as the line of the quarries. Hopkins, as a surveyor, laid off the quarries, based upon the testimony of Sanchez and the location of the said pile of stone; pp. 115-119. Map referred to, Exhibit "L."

There is testimony that there has been quarrying and that coquina formation exists in different parts of the island, but that is no proof that all such deposits and places of quarrying were within the reservation. The

contrary is shown by the agreement between Perpall, as agent of the Fish heirs, and Lieutenant Tuttle, U. S. Engineers, made in 1833, p. 258.

The quarries could not have been of great extent as they had been marked by four stakes. There is nothing in the testimony which would justify the Court in overruling the finding of the master as to the location of the quarry. If the exception of the quarries is not sufficient and the fact of their location in the past is not sufficient to properly designate them at this time, the grantee should not be made to suffer thereby. The rule is that all exceptions and reservations in a deed are to be construed more strongly against the grantor.

2 Devlin Deeds, 979;

Jackson vs. Hudson, 3 Johns, 375; 3 Am. Dec., 500;

Klan vs. Ridgway, 86 Pa. St., 529;

Wiley vs. Sidorus, 41 Iowa, 224.

Counsel for appellant cites the Segui grant in the words, "Let there be granted to him in absolute dominion 7,000 acres of land which he petitions for under the boundaries which he points out. "Yet," he says "this grant, in which the language is immeasurably more to be taken as a conveyance of absolute title than the Fish grant, is declared by Mr. Justice Catron to be 'a concession in the first form.'" Marvin vs. U. S. 3 How., 620.

The Segui grant was for 7,000 acres which, when the concession was made, had not been segregated from the public domain by survey, and that defect was not supplied by natural boundaries as the Fish grant, with the reservation already laid off.

In considering the validity of the Fish grant, we submit that the proceedings not only established a grant to Fish, Junior, at that time, but were an *adjudication* of his rights as an heir and purchaser of his father's estate, and entitled to the property.

We find in the proceedings, the sale of the estate of Jose Fish for payment of debts, p. 263, Commission of Governor Quesada, dated January 18th, 1792, p. 283, to Solano and Leonardy for the appraisement of the estate in this he mentions, "The place called 'El Verjel,' *which belongs to the deceased*, although the title under which he held it does not appear in the proceedings." The sale of "The Verjel" to Fish, is confirmed by Governor Quesada, order of March 21st, 1792, —. 285.

Fish, in his original petition, sets forth his said purchase and prays to be declared the owner of the lands which his father possessed annexed to said Verjel which according to the deeds granted in the time of the British possessions, amounted to 10,000 acres. Then follows the other proceedings which have already been noticed, with testimony, exhibits, etc. Fish's amended petition, reports of various officials. Notice given at each stage to Fish and proper officials representing the government. All in accord with judicial proceedings, with a decree finding as facts that Fish, ancestor of the petitioner, possessed the 10,000 acres since the time of the old Spaniards and in that of the British dominion, which possession he, Fish, Junior, claims at the place named the *Verjel*, which he purchased at public sale, also that he offered a bid for the said land, under which his purchase ought to be understood, which defect by not explaining it thus and at the time should not be prejudicial to him, and which has given cause to this *litigation*. The order following making the grant in confirmation of the title of Fish and decreeing the marking of the boundaries and

placing Fish in possession, which decree was duly executed. These proceedings constituted an absolute and complete adjudication of the title of Fish, and cannot be constructed as simply a grant *de novo*, or preliminary concesion.

In this connection we desire to call attention to the claim of Francis P. Fatio for 10,000 acres. This is found in Vol. 4, Am. State Papers, p. 244. The petitioner claims under a British grant to his father, of the same name, deceased, alleging that the titles were lost during the troubles in 1812. There appears a survey of the grant in 1791. The only proof offered is by a single individual, one Marin, that he knows the tract, and that Francis P. Fatio resided thereon upwards of thirty years, that the buildings were burned by the Indians, and it is well known that the claimant was in the possession of said land. This grant was affirmed by this Court; U. S. vs. Fatio, 8 Pet. 492. The Court holds that the lands were surveyed and confirmed by the Spanish authorities and make reference to the Acts of Congress and the treaty between Spain and England, and further say: "In addition to the above laws and treaties, the petitioners have proved a possession which constitutes a title by prescription, by the laws of Spain."

By the laws of Spain, prescription for the period of ten years has the same effect as twenty by the principles of the common law. Mitchel vs. U. S., 9 Pet., 761 (9-301).

The long possession of Fish, Senior, under claim of title and the adjudication in favor of Fish, Junior, recognizing his right as a son, justifies the conclusion that there was a grant in fee to Fish, Senior, by either the old Spanish or the British government.

U. S. vs. Chaves, 149 U. S., 452 (40-215).

The Fish possession, father and son, was shown to be more than thirty years, and we respectfully submit that his possession and title was fully confirmed by the Spanish government and were more completely shown than that of Fatio.

This possession of Fish continued in those claiming under him.

Annie E. Furman (84 years old) testifies, pp. 235, 236, that Jesse Fish was living with his mother, Sarah Warner Fish, on Anastasia Island until he was killed by lightning about 1815 or 1816. Sarah Warner Fish lived on the island until her death, in 1824.

Venancio Sanchez, testifies pp. 248–250, that he had charge of the island for Charles M. Furman and other Fish heirs, for more than forty years; that he (Furman put him in charge of it. That he had charge of the servants who worked at the house place. There was an orange grove on the place. There was a stone dwelling-house, kitchen and dairy and a half-dozen or more servants' buildings. There was a fence which he had repaired, made dams. etc. This was the homestead of Jesse Fish. The old buildings were destroyed during the war, and he had wooden buildings erected. He constantly had someone living on the property. They got wood from the hammocks, and posts were gotten for fences.

There is an attempt to show by the cross examination of Sanchez, that the old homestead place is now held adversely by his son. This would not affect complainants' title to the land sued for, which does not embrace the homestead, but it is clearly shown, page 256, that the holding is not adverse to the complainants.

If the question of the present possession of the homestead were material, a Court could not sustain the delivery of possession by the agent of the owner of the property to such agent's son, in order to force a money settle-

ment, which would be the position of this witness. On the re-direct examination p. 256, Sanchez says, he continued in charge of the property superintending the interest of the heirs of Fish or Furman.

That he got the title in his son to get it out of those unfriendly to the Fish claim. That there was no antagonism between himself and his son.

The presumption is that there was no break in the possession from the death of Mrs. Fish to that of Furman claiming under the same title.

It is shown by the testimony of Stokely that the land involved in this suit is wild land, not cultivated or improved, and no one is living on it.

To avoid unnecessary repetition of authorities, we will consider the third, fourth and fifth propositions together.

Third.—THAT PERFECT OR COMPLETE TITLES WERE CONFIRMED BY THE TREATY WITH SPAIN CEDING THE FLORIDAS.

Fourth.—THAT SUCH CONFIRMATION HAD THE FORCE AND EFFECT OF AN ACT OF CONGRESS.

Fifth.—THAT THE UNITED STATES DERIVED NO TITLE TO THE FISH GRANT BY THE CESSION OF FLORIDA

U. S. vs. Arredondo, 6 Pet. 691, (8-547)

U. S. vs. Perchman, 7 Pet. 51, (8-604)

U. S. vs. Clarke, 8 Pet. 438, (8-1001)

U. S. vs. Wiggins, 14 Pet. 334, (10-481)

U. S. vs. Chaves, 152 U. S., 452, (40-215)

Anisa vs. New Mexico & A. R. R. Co., U. S Sup. Ct., Oct. Term, 1899.

McGee vs. Doe, 9 Fla. 382.

Doe ex Dem. Magruder vs. Roe, 13 Fla. 611.

Keech vs. Enrique, 28 Fla. 597.

We have already shown that this Court had adopted as the proper construction the wording of the 8th article of the treaty, in the Spanish as translated "That all grants" &c., "*shall remain confirmed.*"

6 Pet. 736-741-742

7 Pet. 51; 14 Pet, 349.

In the Arredondo case, 8 Pet. opinion 741, say the Court:

> We consider the grants were confirmed and annulled respectively and simultaneously with the ratification and confirmation of the treaty, and that when the territory was ceded. the United States had no right in any of the lands embraced in the confirmed grants."

In the Perchman case, 7 Pet. 51, the security of the right of property in case of change of sovereignty, even by conquest, is forcefully declared. "People change their allegiance" *** "but their rights of property remain undisturbed."

"The *Eighth* article of the treaty must be intended to stipulate expressly for the security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security, further than its posi-

tive words require, would seem to be admissible. Without it, the title of individuals would remain as valid under the new government as under the old. And those titles, so far at least as they are consummated, might be asserted in the courts of the United States, independently of this article."

We can use no language more concise or expressive to sustain our contention than to quote from the Wiggins case, 14 Pet. 349, (10-489) as follows:

> It was adjudged by this court in the case of Arredondo and Perchman (6 and 7 Peters) that the words 'shall be ratified and confirmed' in reference to perfect titles, should be construed to mean, are ratified and confirmed in the present tense. The object of the Court in these cases was to exempt them from the operation of the Eighth article, for the reason that they were perfect titles by the laws of Spain, when the treaty was made; and that when the soil and sovereignty of Florida were ceded by the Second article, private rights of property were by implication protected. The Court, in its reasoning, most justly held that such was the rule by the laws of nations, even in cases of conquest, and undoubtedly so in a case of concession; therefore, it would be an unnatural construction of the Eighth article, to hold that perfect and complete titles, at the date of the treaty, should be subject to investigation and confirmation by this government, and to reconcile the article with the law of nations, the Spanish side of the article was referred to in aid of the meaning of the American side, when it was ascertained that the Spanish side was in the present tense; whereupon the Court held that the implication resulting from the Second article, being according to the law of nations, that, and the Eighth article were consistent; and that perfect titles 'stood confirmed' by the treaty, and must be recognized by the United States and in our courts.

That the perfect titles made by Spain before the 24th of January, 1818, within the ceded territory are intrinsically valid, and exempt from the provisions of the Eighth article, is the established doctrine of this Court, and that they need no sanction from the Legislative or Judicial departments of this country.

The above doctrine is still adhered to by this Court, U. S. vs. Chaves, 159, U. S. 452, (40-215) Anisa vs. New Mex. & A. R. R. Co. October Term, 1899. It is adopted by the Courts of Florida, as the rule of property which govern titles, derived from the Spanish government. This is fully set fourth in the case of McGee vs. Doe, 9 Fla., 382, holding that the treaty itself operated as a confirmation of property rights, acquired prior to the date therein named. Say the Court, page 396, "Accordingly we are driven to decide that Peter Alba, junior, in his life time had a good and valid title, by purchase of the Spanish government, to said lots, and that the same was *confirmed* to him by the treaty."

In Doe ex dem. Magruder vs. Roe, 13 Fla., 602, involving land claimed by the defendant in that case under this grant to Fish, the Supreme Court in reference thereto, accepting the decisions of the United States Supreme Court, decided that, "The grants or concessions of land made by the Spanish government, anterior to the treaty of concession, whereby Florida was annexed to the United States, are deemed to have been ratified and confirmed by the Eighth section of the treaty, without further action by Congress."

To same effect. Keech vs. Enrique, 28 Fla., 597.

A treaty with the United States is the Supreme Law of the Land by which all Judges ore bound. U. S. Constitution, Art. VI, Clause 2.

A treaty of the United States is to be regarded in Courts of Justice as equivalent to an Act of Legislature, when it operated of itself without the aid of any legislative provision. Foster and Elam vs. Nielson, 2 Pet, 253.

The question involved in this case was the validity of a Spanish grant in the territory between the Mississippi and Perdido Rivers. The Court held against the grant, as it involved the question of territorial jurisdiction, which was properly a question of political determination, and had been determined by the political department of the Government as against the claim of Spain, by which the Courts are bound. In this case the words of the Eighth Article of the treaty "shall be ratified and confirmed" were held to import a contract, requiring further legislation to confirm titles. But this is reversed by the later decisions cited. Say the Court, in the Perchman case, 7 Pet. 89; referring to the said words of the treaty. "In the case of Foster vs. Elam (2 Pet. 253) this Court considered the words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had these circumstances been known, we believe it would have produced the construction which we now give the article."

We respectfully submit that the Court, having jurisdiction of this cause, must be governed by the treaty by the law of the land.

Sixth.—THAT THE ACT OF MAY 23RD, 1828, DID NOT OPERATE TO CONFISCATE OR VEST IN THE UNITED STATES LANDS HELD BY PERFECT SPANISH TITLE, OR TO PREVENT THE ASSERTION OF SUCH TITLE IN THE COURTS OF THE

COUNTRY AGAINST ADVERSARY CLAIMS, NOTWITHSTANDING PROCEEDINGS WERE NOT INSTITUTED THEREON WITHIN THE TIME LIMITED BY SAID ACT, OR AS EXTENDED BY THE ACT OF MAY 26, 1330.

Section six of the said Act of 1828 provides:

> That all claims to land within the Territory of Florida, embraced by the treaty between Spain and the United States of the twenty-second of February, one thousand eight hundred and nineteen, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act: and which have not been reported, as antedated or forged by said commissioners, or registerer and receiver acting as such, shall be received and adjudicated, by the Judge of the Superior Court of the District within which the land lies, upon the petition of the claimant.

Section twelve:

> That any claims to lands, tenements, or hereditaments, within the purview of this Act, which shall not be brought by petition before said Court, within one year from the passage of this Act, or which after being brought before said Court, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within two years, shall be forever barred, both at law and in equity; and no other action at common law, or proceedings in equity, shall ever thereafter be sustained in any Court whatever.

In each of said sections, the words "claims to land," or "lands," is used. The word "Claim," noun, is defined in Black's Law Dictionary, as "A challenge of the property or ownership of a thing which is wrongfully, withheld from the possession of the claimant." This definition is sustained by the following authorities:

Plowd. 359. 2 N. Y., 245.

Priggs vs. Pennsylvania, 16 Pet. 615, (10–1089)
6 Daly, 446.

All the authorities held it to refer to the assertion of a right of which the claimant is not in the full possession or enjoyment.

The word "Claims," therefore, as used in the Statute should be construed to refer to those titles which the Courts designate as inchoate. This Court in the litigation involving Florida, Spanish Grants, constantly speak of perfect Spanish titles. These are words of the superlative: Such titles they hold are recognized by the United States and confirmed by its treaty. They can require nothing more to render them complete. The act under consideration was passed before such decisions were rendered, holding the treaty to be self-operating, under the Spanish version, and if Congress intended the act to apply to all grants, perfect as well as inchoate, it was doubtless under the erroneous impression that all required confirmation. But, whatever impression prevailed at the time, the act must now be construed in the light of the decisions which are unambiguous, and in no uncertain language.

We quote from the Wiggins Case, 15 Pet. opinion p. 350.

> That perfect titles made by Spain before the 24th of January, 1818, within the ceded territory, are intrinsically valid, and exempt from the provisions of the Eighth article, is the established doctrine of this Court, and that they need no sanction from the Legislative or judicial departments of this country.
>
> But that there were at the date of the treaty very many claims whose validity depended upon the performance of conditions in consideration of which the concession had been made, and which must have been performed before Spain was bound to perfect the titles, is a fact rendered prominently notorious by the legislation of Congress and the litigation in the Courts

> of this Country, for now nearly twenty years. To this class of cases the Eighth article was intended to apply; and the United States were bound, after the cession of the Country, to the same extent that Spain had been bound before the ratification of the treaty, to perfect them by legislation and adjudication; and to this end the government has provided that it may be sued by the claimants in its own courts, where the claims shall be adjudged, and the equities of the claims determined and settled according to the law of nations, the stipulations of the treaty, and the proceedings under the same, and the laws and ordinances of the Government from which the claims are alleged to have been derived.

The legislation referred to as providing that the government "may be sued in its own courts," as to such conditional Florida claims, is the act of 1828.

There was no occasion or necessity for those holding under Fish, availing themselves of the privilege to sue the United States. They held a perfect title combining *possession, right of possession, and right of property.* There was nothing that they were deprived of, or that was withheld from them, or any imperfection in their title, so as to render it necessary for them to invoke the aid of the Courts.

The United States commissioners had found it valid and so reported.

The case of U. S. vs. Marvin, 3 Howard, 620, is in harmony with our contention. This was the case of the Segui grant, which was but a concession before survey and no final complete grant. Referring to the limitation in the acts of 1828 and 1830, the Court holds,

> That limitation was one year. The Courts of Florida, therefore, had no right to receive a petition for the confirmation of an *incomplete concession* after the 26th of May, 1831.

It is undoubtedly true that after the expiration of the limitation the Court could not entertain a petition against the United States under that statute. It is also true that many perfect titles were submitted to and passed upon by the Courts under the Act of 1828, and the supplementary Act of 1830. But the proceedings were instituted prior to the construction by the Court of the wording of the Eighth Article of the treaty, at a time when the impression prevailed that all grants to be valid, whether complete or otherwise, must be confirmed by Congress, or some tribunal under congressional authority. Even though the Courts had jurisdiction of a petition to determine the validity of a perfect grant, that furnishes no argument that a failure to procure such adjudication within the time limited destroyed the title, confiscated the property and vested the same in the United States.

Let us now consider the case of Botiller vs. Dominguez, 130 U. S., 238 (32-926), upon which the Secretary of the Interior based his decision, refusing to recognize the Fish grant, and on which appellants rely to sustain their claim of the bar of the statute. But for the distinction drawn by the Court in that very case, it might appear to be in conflict with the great array of the decisions of the same Court as to Florida cases. But the distinction is so clearly drawn that it appears to us strange that the Honorable Secretary should have disregarded it in his decision of a Florida grant.

This case arose by suit in ejectment under a claim to lands in California, by virtue of a Mexican grant. The Court refers to the various acts and proceedings for the ascertainment of titles under the Louisiana and Florida purchases; and commends the wisdom of the Act of 1851 to ascertain and settle private land claims in California, and cites approvingly Freemont vs. U. S., 17 How., 542, 553, holding that the California act embraces legal as

as well as inchoate or equitable titles and, "in that respect, differs from the act of the government to vest in the act of 1824, under which claims in Louisiana and Florida were decided. The jurisdiction in these cases was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claims to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed. The court had no power to sanction or confirm it when proceeding under the Act of 1824, or the subsequent laws extending its provisions."

It is claimed that the Act of 1824 referred to did not embrace Florida grants. Yet the Act of 1828 involving Florida, provided that the same should be according to the conditions, restrictions and limitations prescribed to judge and claimant under the said Act of 1824. We cannot suppose that Chief Justice Taney in Freemont vs. U. S., *inadvertently* distinguished perfect Florida grants from grants in California, or that Mr. Justice Miller, in Botiller vs. Dominguez *inadvertently* quoted approvingly said language in the Freemont case, which is in harmony with the long line of decisions involving Florida grants.

The distinction between the status of complete Florida grants and those in Louisiana and California by operation of the respective treaties, abundantly relieves the case of Botiller vs. Dominguez of inconsistency with the great array of cases, heretofore cited, adjudicating Florida grants. The treaty of Paris, April 30, 1803, ceding Louisiana, Article 3, and the treaty of Guadalupe Hidalgo, February 2, 1848, whereby California was acquired, Articles 8 and 9, provide for the enjoyment of property, but contain no words of confirmation, as in the treaty ceding Florida, which were held to be self-operating, without

legislative action. The stipulations in the French and Mexican treaties, were properly addressed to the political department of the government, and resulted in the enactment of laws for the ascertainment and confirmation of land claims, by which the Courts were bound.

The distinction is drawn in McGee vs. Doe, 9 Fla., 297, between the treaty ceding Louisiana and that ceding Florida, holding that the former imposed a political obligation on the government to perfect titles, while the latter operated as a confirmation thereof.

Story's Eq. Pleadings (10 Ed.), Section 469, citing cases.

We would also call attention to the distinction between the two statutes as to the effect of failure to proceed within the time limited. The statute of 1851 provides that "All lands the claim to which shall not have been presented to the said commissioners within two years, after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." The Act of 1828, which, in this regard, is practically the same as that of 1824, contains no such language, but prohibits action at law or suit in equity thereafter. Which taking the whole statute together must be construed as applying to the right to litigate under that act, that is to sue the United States, or to sue for something that the party is out of possession, or not in the full enjoyment of.

Even if Congress had the right to forfeit ones property, which we deny, except for taxation, punishment of treason or other crime, or in the exercise of the right of eminent domain, the Courts would not sustain such action by implication, in the absence of an express statute.

> Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property to which they may be fairly applicable, and not particularly applied by the legislature—no silent, implied and constructive repeals ought ever to be understood as to divest a vested right. Rutherford vs. Green, 2 Wheat., 203 (4-220).

We insist that the United States never acquired title to the land embraced in the Fish Grant, and therefore could not transmit title to another: Hence any adverse claim of title emanating from the United States is invalid, and must be set aside.

We again invoke the Arredondo case (6 Peters) which so fully sets forth the law bearing upon Spanish grants in Florida. Say the Court, page 738, "A government is never presumed to grant land twice." The opinion citing many authorities to this proposition, pages 739 to 741.

> If the words of the treaty were that all grants 'shall remain confirmed,' then the United States by accepting the cession could assert no claim to these lands thus expressly excepted. The proprietors could bring suits to recover them without any action of Congress and any question arising would be purely a judicial one.
>
> Page 742, For these reasons and in this conviction, we consider that the grants were confirmed and annulled, respectively, simultaneously with the ratification and confirmation of the treaty, and that when the territory was ceded, the United States had no right in any of the lands embraced in the confirmed grants.

So in the Perchman case, 7 Pet., 51, without repeating at length, it is held that the second article of the treaty conforms to the principle that the rights of property are not affected by the change of sovereignty, and that the Eighth article expressly stipulates for the security to private property, which the law of nations would have conferred.

Say the Court in the Clarke case (8 Pet., p. 445).

> Neither the law of nations or the faith of the United States would justify the Legislature in authorizing these boards to annul pre-existing titles, which might consequently be asserted in the ordinary courts of the Country *against any grantee of the American Government.*

The contention of the defendant, and the decision of the Secretary of the Interior in effect, that the failure to institute proceedings under the acts of 1828 or 1830, vests the land in the United States, is contrary to the Fifth Amendment of the Constitution, that no person shall be deprived of life, liberty, or property without due process of law. The United States by treaty confirmed perfect titles, as shown above. Such titles were vested in the grantees.

In Ervine's Appeal, 16 Pa. St., 256, 55 Am. Dec. 500, the Court applying the above provision of the Constitution, says:

> If the legislature possessed an irresponsible power over every man's private estate, whether acquired by will, by deed, or by inheritance, all inducement to acquisition, to industry and economy would be removed. The principal object of government is the administration of justice and the promotion of morals. But if property is subject to the caprice of an annual assemblage of legislators acting tumultuously and without rule or precedent, and without hearing the party, stability in property will cease,

> and justice will be at an end. If the government is interceded from taking private property, even for public use without just compensation, how can the legislature take it from one man and dispose of it as they think fit? The great principle is that a man's property is his own, and that he shall enjoy it according to his pleasnre (injuring no other man), until it is proved in due process of law that it is not his but belongs to another.

We ask a consideration of this constitutional inhibition as treated by Judge Cooley, in his work on Constitutional Limitations, (Fifth Edition), Chapter 11, commencing star page 351. On page 357 he says:

> But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or private enactment.

Referring to the qualifications of the application of this Constitutional provision whereby one may lose his property, the learned author mentions the statutes of limitation, where one, by lapse of time, forfeits his right to assert his title in law. On page 366, says:

> But one who is himself in the legal enjoyment of his property, cannot have his rights therein forfeited to another, for failure to bring suit against that other, within a time specified to test the validity of a claim which the latter asserts but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed, purporting to be executed under a statutory power, conclusive evidence of good title could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by

one who is already in the complete enjoyment of all he claims.

This effectually disposes of the contention that the Fish heirs are cut off by laches or the limitation in the act of 1828.

The foregoing applies with equal force to the contention that a failure to release all in excess of a league square, under the provisions of said act of 1828, operates to the prejudice of the rights of the grantee. Congress possessed no power to confiscate a part or the whole of one's property, except as a punishment for treason.

The decision of the officers of the Land Department is not res adjudicata.

It is contended by the defendants that the decision of the United States Land Department against the Fish title *is res adjudicata*, and deprives the Court of the right to adjudicate this cause.

While the law may confide to the Land Department the determination of certain questions of fact which arise in the course of the duties connected with such department, we are aware of no act which authorizes the Land Department to adjudicate titles to property, or determine the validity of Spanish grants. If there were, it would not oust the jurisdiction of a Court of Equity to correct mistakes, injustice, wrong and errors of law committed by the officers of the Land Department which invade and violate the rights of property. This is no longer an open question. All the judicial power of our Government is vested by the Constitution in the Courts.

The Courts have time and again annulled the action of the Land Department, and held invalid and set aside United States' patents issued thereon.

Cunningham vs. Ashley, 14 How., 377. (14–462)

Barnard vs. Ashley, 18 How., 43. (15–285)

Garland vs. Wynn, 20 How., 6. (15–801)

Lindsey vs. Hawes, 2 Black, 554. (17–266)

Johnson vs. Towsley, 13 Wall., 72. (20–485)

Johnson vs. Dillon, 34 Fla., 130.

In the case of Barnard vs. Ashley, supra, it was contended that the Register and Receiver having, on due proof and examination, rejected Barnard's claim of entry he is thereby concluded from setting the same up in a Court of Equity, but the Court held that the Register and Receiver do not so act in a judicial capacity that their judgment on the matter is conclusive.

In Garland vs. Wynn, and Lindsey vs. Hawes, it is held that the regulations of the Commissioners of the General Land Office, whereby a party may be heard to prove his better claim to enter land, do not oust the jurisdiction of the Courts of justice.

In Johnson vs. Towsley, the question of the jurisdiction of a Court of Equity to pass upon the action of officers of the Land Department is exhaustively discussed, and the Court lays down the law as follows:

> When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority, is conclusive upon all others.
>
> The action of the Land Office in issuing a patent for any of the public lands, which is subject to sale by pre-emption or otherwise, is conclusive of the legal title.
>
> Courts of Equity have the power to inquire into and correct mistakes, injustice and wrong in judicial and executive action, when it invades private rights.
>
> When officers of the Land Office decide controverted questions of fact, in the absence of fraud,

> imposition or mistake their decisions on those questions are final, except as they may be reversed on appeal in that department.
>
> But when they, by misconstruction of the law, take from a party that to which he has acquired a legal right, the Courts have power to give relief.

In St. Louis Smelting Company vs. Kemps, 104, U. S. 636 (26–875), it is held that:

> Courts of Equity have power to correct mistakes and relieve against frauds and impositions; and to give the proper relief where it is clear that the officers of the Land Department have, by a mistake of law, given land to one man which belongs to another.

It is also held, page 636, that even in a case of law, the invalidity of a patent may be shown if the lands never were public property, etc., and the attempted conveyance of them by the Department would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed.

See also Patterson vs. Winn, 11 Wheat., 380.

In order that a judgment or decree may be set up as a bar, it must have been made by a Court of competent jurisdiction upon the same subject matter, between the same parties and for the same purpose.

Washington, etc., Packet Company vs. Sickles, 24 How., 333 (16–650).

Aspden vs. Nixon, 4 How., 467 (11–1059).

The decision of the Commissioner of the General Land Office which was affirmed by the Secretary of the

Interior, was upon the application of C. M. Furman, one of the parties, for a patent for the Anastasia Island Grant. Such decision, therefore, in no respects comes up to the rule of *res judicata*. The Commissioner of the General Land Office was not a Court of competent jurisdictioy to adjudicate the caee at bar and grant the relief thereby sought.

Seventh. COMPLAINANTS DERIVE TITLE FROM JESSE OR JOSE FISH.

The facts are shown by the testimony of Ann E. Furman, pp. 235–236, and Charles M. Furman, pp. 112–113, and will, letters of administration and deeds, exhibits "C," "D," "E," "F."

The following law respecting descents applies: Spanish law in force when Jose Fish died—

"In default of descendants, ascendents succeed or inherit, and being those who ascend by the right or direct line, it follows first that if there are no children, grandchildren, etc., the parents succeed."

1 White Recopilation, 116.

Act of Territory of Florida, August 12th, 1822, in force at time of the deaths of Sarah Warner Fish and of her granddaughter, Jessie R. Furman, provides that: "Whenever any person having title to real estate of inheritence shall depart this life, intestate, such estate shall descend in parcenary to the male and female children in the following course, that is to say:

1. To children or their descendants, if any there be.

A statute of descents was also enacted by said Territory November 12, 1829, which re-enacted that portion of the act of 1822 above quoted, and also in regular order, as follows:

2. If there be no children, or their descendants, then to his father.

We will hereafter refer to section 11 of said act.

Act of the Legislature of Florida of 1872 provides: that if a man dies in this state without children who shall at the time of his death be possessed of real and personal property, or either, the wife will take the whole estate, or dower, at her election.

The foregoing laws of descent are still in force. R. S. of Fla., Sec. 1820.

Jesse Fish died intestate 1815, leaving his mother, Sarah Warner Fish, his sole heir.

Sarah Warner Fish died intestate 1824, leaving her granddaughter, Jessie R. Perpall, her sole heir. Said Jessie intermarried with Charles M. Furman.

Jessie R. Furman, (nee Perpall) died 1827 leaving her only child and son by this marriage, William Gabriel Furman, born 1827, her sole heir.

William Gabriel Furman died 1836, leaving his father, Charles M. Furman, his sole heir.

Charles M. Furman died in Charleston, S. C., in 1872, leaving a will whereby he devised his property to Complainant, Charles M. Furman, one-half; to Richard K. Furman, one-fourth, and to Complainants Bolivar B. Furman and Irvin K. Furman, one-quarter. Will was probated in Charleston, S. C., and recorded in St. Johns County, Florida.

Richard K. Furman died intestate without children in 1894, leaving his wife, Julia R Furman, his sole heir. Her interest in Anastasia Island is conveyed by deed to complainant, Alester G. Furman.

Interest of Irvin K. Furman is conveyed by deed to Alester G. Furman.

Counsel for appellants contend that Sarah Warner Fish left a will. An attempt is made to introduce a rec-

ord of the probate Court by testimony of the clerk of the Circuit Court, whom we have shown *supra* did not have the proper custody thereof. The master, therefore, excluded the testimony. If, however, the testimony, is received, it shows order made July 27th, 1841, seventeen years after the death of Sarah Fish, directing the executors of her estate to file an inventory and accounts. There is also mention in the American State Papers of the executors of the estate of Sarah Fish, deceased. Venancio Sanchez makes reference to the will of Sarah Fish, says he saw it in a proper office for record, and presumed it was burned when the records of the probate office were burned in 1887. He states, p. 257, that he did not know the signature or handwriting of Sarah Fish, or whether the will was probated, and could not state the contents or wording. Nothing is shown but a paper found in the probate office said to be the will, without proof of contents, signature, witnesses, probate or record.

At the time of the death of Mrs. Fish, the act of the Legislature of Florida of August, 1822, was in force, which provided :

> That, every person aged twenty-one years or upwards, being of sound mind and not a married woman, shall have power at his or her will and pleasure, by last will and testament in writing, to devise all the estate, right, title and interest in possession, remainder or reversion, which he or she hath, or at the time of his or her death shall have of, in or to lands, tenements or hereditaments, annuities or rents, issuing out of them ; goods and chattels, so as such last will and testament be signed by the testator or testatrix or by some other person in his or her presence, and by his or her directions; and moreover, if not wholly written by himself or herself, be attested by two or more competent witnesses, subscribing their names in his or her presence—saving to the widow of testators their right of dower in lands and

tenements, which shall not be prejudiced by the devise thereof.

If there was a will which had been lost or destroyed and defendants proposed to rely upon it in their defense, it should have been re-established by proceedings in equity or petition under the statute setting up a substantial copy. Revised Statutes of Florida, 1523-1535. If it should be held, however, that the testimony established a devise of Anastasia Island by Sarah Fish, we must accept the testimony of Sanchez that it was divided between Jessie Furman and her blood relations in Greenville. Jessie Furman, as shown, was the granddaughter of Mrs. Fish. It does not appear that at the time of the devise or death of Mrs. Fish that she had any other blood relations than her said granddaughter, nor have we any testimony as to who said blood relations were, so that the will, if any, did not change the title of the property from Jesse Furman, through whom complainants claim.

Appellants seek to show that the title did not pass from the infant, William Gabriel Furman, to his father Charles M. Furman, but to relatives of his mother. We have shown, *supra*, that the law of descents enacted in 1822 and re-enacted in 1829, which provides section 2, that if there be no children, then the father is the next to inherit. This is omitted by appellants' counsel in his brief in which, however, he copies Section 11, whereby it is provided that on the death of an infant owning land derived from his mother, having at the time certain relatives living on the part of the mother, the property should go to them instead of the father.

The inheritance of the father from the son as provided by Section 2, can only be defeated by the existence of such facts at the time of the death of the infant as being the case within Section 11, and defendants to avail

themselves of such facts and thereby defeat the alleged inheritance of the father, must affirmatively allege them in his answer as well as prove them. Yet he has failed to do either. The bill alleges the inheritance of Chas. M. Furman from his son. This is not denied by the answer. Answering such allegation defendants say "That they are not advised of the line of descent set out in the bill * * * but leave complainants to make such proof of the descent of their common ancestor, Joseph Fish, as they may be advised."

A defendant ought to apprise the plaintiff of the nature of the case he intends to set up, and then too, in a clear, unambiguous manner, and in strictness he cannot avail himself of any matter of defense not stated in his answer, even though it should appear in his evidence.

1st Daniel Ch., 712.

Burnham vs. Dalling, 18 N. J. Eq., 132.

Not only have the defendants failed to make such allegation in their bill, as to avail themselves of the point that Charles M. Furman did not inherit, but there is no testimony to show that, at the time of the death of the infant, 1836, there was any relation living on the side of the mother who would defeat the father's inheritance. The aunt, Mrs. Sanchez, who was the half sister of Mrs. Furman, is not shown to have been living at the time, or that she was the mother of Wm. J. Sanchez, as claimed, nor is it shown that the Grand Father, William Gabriel Perpall, was then living, or that he was the Gabriel W. Perpall, who signed the contract with Lieutenant Tattle, three years before the death of the infant.

Possibilities or conjectures should not be indulged in to controvert the testimony showing the inheritance of Charles M. Furman, especially in the absense of a

sufficiently affirmative allegation in the answer to support the same.

"In the consideration of a fact which is peculiarly susceptible of proof, the Court will not be influenced by mere circumstances to adopt a conjectural conclusion, in regard to its existence." Ormand vs. Barnard, 5 Florida, 528.

We would, again, in this connection, invoke the authorities cited above as to the conclusiveness of the findings of facts, of the master, sustained by the Court as to the inheritance.

An attempt was made by the deposition of one, Mary E. English, an aged mulatto woman, living in Key West, Florida, pp. 367 to 372. to show that Jesse Fish was married and left children as his heirs. But as appellant's counselmakes no such contention in his brief, nor did he in the argument in the court below, we may treat the claim as abandoned. Suffice to say, there is no evidence of the marriage between Fish and the Negro woman Clarissa, the mother of said deponent. On the contrary, it appears by the records of the Roman Catholic Church at St. Augustine and translation thereof, Exhibits "N" "O" "P" "Q" "R" "S" "T", pp. 261 to 265, as proved by Michael Molier, pp. 211-212, also testimony of John Masters, A. D. Rogero and Venancio Sanchez, pp. 209, 210, 211, that the woman Clarissa was a slave and her issue by Fish illigitimate. They never appear to have been in possession of, or made any claim to the property.

The defendants do not claim under the Fish title, so that a diversion of the inheritance in no manner strengthens their title.

Charles M. Furman was in possession for many years, he put Sanchez in charge of the property forty-five years prior to the institution of this suit. Such posses-

sion continued and still continues under claim of title which is sufficient to maintain the bill.

Ricard vs. Williams, 7 Wheat, 59 (5-398)

Sharon vs. Tucker, 144 U. S. 533 (36-532)

U. S. vs. Chaves, 152 U. S., 452 (40-215)

THE TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF FLORIDA MAY BE SUED.

It is a late day to contend, as do appellants, that the Board of Trustees of the Internal Improvement Fund of the State of Florida, cannot be sued because the State's interest is involved.

The Board is composed of officers of the State, and all their rights, powers and duties are as representatives of the State's interests. Yet, from almost the time of the creation of the Board courts have entertained jurisdiction of suits against them. Trustees I. I. Fund vs. Bailey, 10 Fla. 112. Same vs. St. Johns Railway Co., 16 Fla. 531. Same vs. Gleason, 15 Fla. 384. Same vs. Lewis, 34 Fla. 424. Adams vs. Trustees I. I. Fund, 37 Fla. 246. Trustees I I. Fund vs. Greenough, 15 Otto 527.

The exemption from suit of a state is limited to those suits in which the State is a party to the record by name, and does not apply when an officer of the State is sued even though the State's interest is involved. Osborn vs. U.S. Bank, 9 Wheat. 738. Grisar vs. McDonnell, 6 Wall. 363. Davis vs. Gray, 16 Wall. 204, U. S. vs. Lee, 106 U. S. 196, (27–171).

If there were merit in the point raised, it comes too late. No such objection was made when the suit was instituted. The trustees, as to this point, submitted to the jurisdiction of the Court.

The immunity from suit belonging to a State which

is protected by the constitution is a personal
which it may waive at pleasure so that in a suit
well brought in which a State has sufficient in
become a party defendant, its appearance in a Co
United States is a voluntary submission to its jur

Clark vs. Barnard, 108 U. S. 436 (27–7

The Court below committed no error and t
should be affirmed.

FRANCIS P. FLEMING,
HORATIO BISBEE,
FRANCIS P. FLEMING,
C. D. RINEHART,
Solicitors for App

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IG, JR.,

Appellees.